

2513 DEFAMATION: EXPRESS MALICE

Express malice exists when a defamatory statement is (made) (published) concerning a person from motives of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed.

Express malice cannot be inferred solely from the fact that the statement was false¹ and injurious to (plaintiff). If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

In determining whether (defendant) acted with express malice in (making) (publishing) the statement, you will take into consideration the words used and all other facts and circumstances existing at the time the statement was made (published).

NOTES

1. “By definition, a defamatory statement must be false.” Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not “be true in every particular. All that is required is that the statement be substantially true.” Id. It is the defendant’s burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

COMMENT

This instruction and comment were approved by the Committee in 1985. Nonsubstantive editorial changes were made to the instruction in 1993. This revision was approved by the Committee in September 2022, it added to the notes.

The definition of express malice as here used was adopted by the Wisconsin Supreme Court in Polzin v. Helmbrecht, 54 Wis.2d 578, 587-88, 196 N.W.2d 685 (1972), and approved in Calero v. Del Chemical

Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975).

In Reed v. Keith, 99 Wis. 672, 675, 75 N.W 392 (1898), the supreme court held that the malice which must be proved to support an award of punitive damages could not be inferred solely from the fact that the words were false and injurious to the plaintiff. Express malice could be implied from that fact along with all other facts and circumstances, including inferences drawn from the utterance of slanderous words.